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FACEBOOK, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DONALD SILVERSTRI, DAWN KEER,
KIMBERLY MANCELLA, JILL
SILVERMAN STRELZIN, and
CHRISTOPHER LEMOLE, on behalf of
themselves and others similarly situated,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. C10-cv-00429 (JF)

ERIC MARKOWITZ, FRANK
BLUEMENTHAL, LAUREN REESE, and
BILLY STERN, on behalf of themselves and
all others similarly situated,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. C10-cv-00430 (JF)

**DEFENDANT FACEBOOK'S OPPOSITION
TO PLAINTIFFS' ADMINISTRATIVE
MOTION TO CONSIDER WHETHER CASES
SHOULD BE RELATED**

I. INTRODUCTION

Defendant Facebook, Inc. opposes the administrative motion filed by Plaintiffs in the above-captioned cases (*Donald Silverstri, et al. v. Facebook, Inc.*, No. C10-cv-00429 (JF), and *Eric Markowitz, et al. v. Facebook, Inc.*, No. C10-cv-00430 (JF)) (“Plaintiffs”) to relate those cases to the case captioned *Sean Lane, et al. v. Facebook, Inc., et al.*, No. C08-cv-3845. Under the criteria set forth in Civil Local Rule 3-12, the *Silverstri* and *Markowitz* cases are not related to the *Lane* case. The cases involve different issues and arise from wholly distinct events separated by two years. *Lane* arises from certain interactions between Facebook, the popular social networking website, and third-party websites that participated in Facebook’s Beacon program. The key events in *Lane* took place between November 2007 and December 2007, which was also the putative class period. In contrast, the *Silverstri* and *Markowitz* complaints concern specific changes to users’ privacy settings made on November 19, 2009 and December 9, 2009, two years later. Indeed, Plaintiffs appear to recognize this when they concede that “[t]he Lane matter involves discrete privacy issues from an earlier time.” (Motion 2.) In addition to a lack of factual commonality, there is only limited overlap in the legal theories alleged in the cases. Because of the substantial differences between the two actions, the criteria of Civil Local Rule 3-12 are not met, and coordination of Plaintiffs’ newly filed cases with *Lane* is unwarranted. Moreover, the *Lane* case may soon be resolved, with the motion for final approval of the proposed class action settlement scheduled to be heard before Judge Seeborg on February 26, 2010. (Note that although Plaintiffs’ motion states that *Lane* is pending before District Judge James Ware, the case actually is assigned to District Judge Richard Seeborg, with discovery matters referred to Magistrate Judge Patricia Trumbull.)

II. BACKGROUND

The *Lane* complaint was filed on August 12, 2008 against Facebook and several other defendants—Blockbuster, Inc., Fandango, Inc., Hotwire, Inc., STA Travel, Inc., Overstock.com, Inc., Zappos.com, Inc., Gamefly, Inc., and John Does 1-40 (who are referred to as the “Facebook Beacon Activated Affiliates” or “FBAAAs”). In *Lane*, the plaintiffs alleged that Facebook and the FBAAAs engaged in a program to solicit, advertise, and market business transactions to Facebook

1 users and the users' friends without sufficient consent. According to the *Lane* complaint, under
 2 agreements between Facebook and the FBAAAs, when a user accessed one or more of the FBAAAs'
 3 websites and a certain type of triggering event occurred (for example, making a travel reservation
 4 or online purchase), the website relayed information about the user's activity to Facebook. In
 5 certain circumstances, the user's activity was shared with the Facebook user's network of friends
 6 on the Facebook website. The *Lane* plaintiffs alleged that by doing so, Facebook and the FBAAAs
 7 violated their rights. The key events in *Lane* took place between November 2007 and December
 8 2007, the putative class period. The *Lane* complaint alleged that the actions of the defendants
 9 under the Beacon program gave rise to claims under the Electronic Communications Privacy Act,
 10 the Computer Fraud and Abuse Act, the Video Privacy Protection Act, the California Consumer
 11 Legal Remedies Act, the California Computer Crime Law, civil conspiracy, and unjust
 12 enrichment. The *Lane* case has resulted in a proposed class action settlement, final approval of
 13 which will be sought at a hearing before Judge Seeborg on February 26, 2010.
 14 ([http://www.cand.uscourts.gov/CAND/Calendar.nsf/572d47d88520f842882566a2007f2b59/cd0a](http://www.cand.uscourts.gov/CAND/Calendar.nsf/572d47d88520f842882566a2007f2b59/cd0a5c0f181b8b5988256a01005e0eeb?OpenDocument)
 15 [5c0f181b8b5988256a01005e0eeb?OpenDocument](http://www.cand.uscourts.gov/CAND/Calendar.nsf/572d47d88520f842882566a2007f2b59/cd0a5c0f181b8b5988256a01005e0eeb?OpenDocument).)

16 In contrast, the *Silverstri* and *Markowitz* complaints were filed against Facebook on
 17 January 29, 2010, and arise from events in late 2009 that have no relationship to the Beacon
 18 program. These complaints assert that two changes made by Facebook to its privacy settings
 19 system decreased user privacy and resulted in wider access to personal information that users had
 20 included in their profiles and had previously been accessible to a more limited number of other
 21 Facebook users. The *Silverstri* and *Markowitz* complaints allege that Facebook's privacy
 22 announcement accompanying these changes was misleading and confusing. Plaintiffs'
 23 complaints do not allege two of the legal theories alleged in *Lane*—namely, the Computer Fraud
 24 and Abuse Act and the Video Privacy Protection Act—and, moreover, allege four causes of
 25 action which are not in the *Lane* complaint: violation of the statutory right of publicity, violation
 26 of California Business and Professions Code section 17200, the common law tort of
 27 appropriation, and injunctive relief.

1 Although the parties agree that *Silverstri* and *Markowitz* are related to each other and
 2 should be consolidated, Facebook does not agree that *Silverstri* and *Markowitz* are related to
 3 *Lane*.

4 **III. ARGUMENT: PLAINTIFFS' ADMINISTRATIVE MOTION SHOULD BE DENIED BECAUSE**
 5 ***SILVERSTRI* AND *MARKOWITZ* ARE NOT RELATED TO *LANE*.**

6 This Court should deny Plaintiffs' administrative motion because the recently filed
 7 *Silverstri* and *Markowitz* cases are not related to *Lane*. Under Civil Local Rule 3-12(a), "[a]n
 8 action is related to another when (1) The actions concern substantially the same parties, property,
 9 transaction or event; and (2) It appears likely that there will be an unduly burdensome duplication
 10 of labor and expense or conflicting results if the cases are conducted before different Judges."
 11 Under these criteria, Plaintiffs' cases are not related to *Lane* and should not be transferred.

12 **A. Plaintiffs' Cases do not Substantially Concern the Same Parties, Property,**
 13 **Transaction, or Event as *Lane*.**

14 Plaintiffs' cases and *Lane* do not concern the same transaction or event as required by
 15 Rule 3-12(a)(1). The facts upon which Plaintiffs base their claims bear no relationship to the
 16 facts upon which the *Lane* complaint is based. *Lane* arises from aspects of the Facebook Beacon
 17 program and, specifically, events which occurred over two years ago. *See supra* part II.
 18 Plaintiffs' claims in *Silverstri* and *Markowitz* are not connected to the Beacon program, and
 19 instead arise from unrelated changes that Facebook made to its privacy settings in late 2009. *See*
 20 *id.* Although Plaintiffs make the generalized contention that that their cases relate to *Lane*
 21 because they "concern common legal issues of privacy" (Motion 2), Plaintiffs fail to point to any
 22 substantially similar transaction or event. In fact, Plaintiffs undermine their conclusion by
 23 conceding that "[t]he Lane matter involves discrete privacy issues from an earlier time." (*Id.*)

24 Further, the *Silverstri* and *Markowitz* cases do not substantially concern the same parties
 25 as *Lane*. Facebook is the only party common to the three cases. While Facebook is the sole
 26 defendant in Plaintiffs' cases, *Lane* names several additional parties as defendants, none of whom
 27 are named or mentioned in the *Silverstri* or *Markowitz* complaints.

B. Keeping Plaintiffs' Cases Before This Court Will Not Cause Unduly Burdensome Duplication of Labor and Expense or Conflicting Results.

Plaintiffs suggest that there might be duplication of labor and expense if this Court were to relate their cases to *Lane*. But in addition to an absence of common transactions, events, and parties, there is only minimal overlap of the legal theories alleged in the cases. *See supra* part II. Thus, keeping the case before this Court would not cause an unduly burdensome duplication of labor and expense. For the same reasons, there is no risk of conflicting results. Moreover, the *Lane* case is at a more advanced stage and may soon be resolved. The motion for final approval of the proposed class action settlement is scheduled to be heard before Judge Seeborg on February 26, 2010.

IV. CONCLUSION

Silverstri and *Markowitz* are not related to *Lane* under the criteria of Civil Local Rule 3-12, and therefore Plaintiffs' administrative motion should be denied.

Dated: February 9, 2010

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/s/ Matthew D. Brown

Matthew D. Brown
Attorneys for Defendant FACEBOOK, INC.

PROOF OF SERVICE
(FRCP 5)

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward Kronish LLP, 101 California Street, 5th Floor, San Francisco, California 94111-5800. On the date set forth below I served the documents described below in the manner described below:

DEFENDANT FACEBOOK'S OPPOSITION TO PLAINTIFFS' ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED; [PROPOSED] ORDER DENYING PLAINTIFFS' ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED



(BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the parties listed below.

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